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Montana. Constitutional
Convention Commission

A MONTANA PLAN FOR COURT
IMPROVEMENT

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A Montana plan for court improvement

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A MONTANA PLAN
FOR COURT IMPROVEMENT

Submitted to
The Montana Constitutional Convention
by
The Montana Citizens Conference
For Court Improvement

The Executive Committee, Montana Citizens Conference for
Court Improvement:

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Catherine Pemberton, Broadus, Chairman 1967-68
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ENDORSEMENT

For the Executive Committee, Montana Bar Association:
William H. Bellingham, President

INTRODUCTORY STATEMENT

The following "Proposed Judicial Article" of the Montana Constitution is designed to provide a unified court system, with administrative machinery to secure coordinated and efficient operation, make available a district court level of justice in all cases throughout the state, supply adjudication by qualified judges selected on merit, and permit flexibility to meet diverse and changing conditions.

It is a "Montana Plan" developed over a period of five years, and carefully drafted after consideration of developments in other states, peculiarities of problems in Montana, and comments, criticisms and contributions of concerned citizens and various Montana legislators, judges and lawyers.

Some sections of the present Judicial Article (Article VIII) have been omitted because they more properly belong elsewhere (i. e. secs. 19 and 26), because they are considered unnecessary in a constitution and more appropriately covered by court rules (i. e. secs. 4, 15, 17, 27, 28), or because they are superseded by the new court structure (i. e. secs. 6, 7, 13, 14, 20, 21, 22, 23, 24, 34, 36). Some sections have been modified and together with new provisions complete a restructured judicial system designed to bring improved justice to the people of Montana.

Comments following each section of the proposal are designed to aid in orientation to existing provisions and explain the intendment.

An appendix has been prepared which reviews trends in judicial reform in other jurisdictions and cites applicable constitutional and statutory provisions. It is available upon request from the Citizens Conference, 1006 West Greenough Drive, Missoula, Montana.

PROPOSED JUDICIAL ARTICLE

JUDICIAL DEPARTMENTS

Section 1. The Judicial power of the state shall be vested in the senate sitting as a court of impeachment, and in a Supreme Court and district courts which shall be courts of record.

Comment: This section is the same as the present sections* 1 and 25, except that all reference to justices of the peace and other inferior courts has been eliminated, in line with one of the purposes of this entire article, which is to absorb the functions of inferior courts into the district courts, and provide an improved and more flexible system of justice.

SUPREME COURT

Section 2. The Supreme Court, except as otherwise provided in this constitution, shall have appellate jurisdiction, which shall be coextensive with the state, and shall have a general supervisory and administrative control over all inferior courts.

Comment: This is a modification of present section 2. Provision for "administrative control" has been added to the present power of "supervisory control." This makes no substantial change but may facilitate another of the general purposes of this article, namely to provide for a system of judicial administration within the court system.

The phrase of the present provision, that the supervisory control of the Supreme Court shall be "under such regulations and limitations as may be prescribed by law," has been eliminated. However, this phrase does not permit the legislature to decrease the power granted to the Supreme Court (*Whiteside v. District Court*, 24 Mont. 539 (1900)). The legislature has not undertaken to prescribe the procedure or time for the exercise of the power, and, especially since the procedural rule-making power now is in the Supreme Court, the phrase should be eliminated.

*References to present sections are those presently appearing in Article VIII of the Montana Constitution.

The court may mandamus a judge in a single judge district to perform his duties and if he fails to do so, may, it seems, order a non-resident judge to perform those duties. (*State ex rel Bennett v. Bonner*, 123 Mont. 414 (1950)). Also, the court presently has the power to apportion business among district judges of a multiple judge district if they fail to make their own apportionment. (R.C.M. 1947, Sec. 93-321; *State ex rel Magnuson v. District Court*, 125 Mont. 79 (1951)).

Section 3. The Supreme Court may appoint an administrative director and staff, who shall serve at its pleasure, to assist the court and the chief justice in the performance of administrative duties.

Comment: This section is new and has no counterpart in the present constitution. It, like section 2, is aimed at creating a clear line of administrative control and will work together with sections 2, 7, 9, 10 and 11 to create an integrated system of administration, and is intended to eliminate any possible need for supplementary legislation if and when the Supreme Court finds that it needs some additional help to carry out its supervisory and administrative duties.

Section 4. The Supreme Court shall have power to make and promulgate rules and regulations in all civil and criminal cases for all courts relating to practice, procedure, pleading, evidence, and judicial administration, which shall have the force and effect of law.

Comment: As a result of legislation, the Supreme Court now has or has had the power to make and does make rules relating to practice, procedure and pleadings.

Rules of evidence really are an integral part of rules of procedure, and, it is believed should be treated in the same way. The Supreme Court of the United States has the power to make rules of evidence for the federal district courts and magistrates, and is currently considering proposals of its Advisory Committee. A similar power in the Montana Supreme Court would permit ready adjustment in the state courts to the rules adopted by the Supreme Court of the United States.

The inclusion of rules relating to "judicial administration" would facilitate the discharge by the Montana Supreme Court of its authority and responsibility under a unified court system.

Section 5. The appellate jurisdiction of the Supreme Court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law. Said court shall have power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, injunction, supervisory control and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices of the Supreme Court shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before the Supreme Court, and such writs may be heard and determined by the court.

Comment: This is a modification of present section 3. It adds the writ of supervisory control to conform to the specifics of writs now issued by the Supreme Court. It also deletes reference to the summoning of a jury, which seems unnecessary and inappropriate to the functioning of the Supreme Court as an appellate court, with limited original jurisdiction, and not a trial court. Further it makes writs of habeas corpus returnable only before the Supreme Court and eliminates returns before a single justice of the Supreme Court or a district court judge (section 8 infra provides for writs of habeas corpus by district courts).

Section 6. The Supreme Court shall consist of a chief justice and four associate justices, a majority of whom shall be necessary to form a quorum or pronounce a decision, but one or more of said justices may adjourn the court from day to day, or to a day certain, and the legislative assembly shall have the power to increase the number of associate justices to six. In case any justice of the Supreme Court shall be in any way disqualified to sit in a cause brought before such court, the remaining justice or justices shall have power to call on one or more of the district judges of this state as in the particular case may be necessary to constitute the full number of justices of which the said court shall then be composed, to sit with them in the hearing of said cause. In all cases where a district judge is invited to sit and does sit as by this section provided, the decision and opinion of such district judge shall have the same force and effect in any cause heard before the court

as if regularly participated in by a justice of the Supreme Court. The chief justice shall preside at all sessions of the Supreme Court. In case of his absence, he shall appoint an associate justice to preside in his stead.

Comment: This combines the substance of present section 5 and the last sentence of present section 8. There is no change in section 5, except that the number of justices is set at 5 with possible future expansion to 7, in contrast to the present section 5 which originally set the number of justices at 3 but permitted expansion to the present number of 5. The last sentence of section 8, which provides that the justice with the shortest time left in his term of office shall be presiding justice in case of the absence of the chief justice, is changed to provide for appointment of the presiding justice. This change would seem to be a slight improvement from an administrative standpoint.

Section 7. There shall be a clerk of the Supreme Court. He shall be appointed by and hold his office at the pleasure of the Supreme Court. His compensation shall be fixed by law, and his duties by the rules of the Supreme Court.

Comment: This is a modification of present section 9, to provide that the clerk would be appointed by the Supreme Court and his duties prescribed by the Supreme Court. This is designed to facilitate efficient operation of the Supreme Court.

DISTRICT COURTS

Section 8. The district courts shall have original jurisdiction of all justiciable matters, both civil and criminal, including jurisdiction to issue original and remedial writs. Their process shall extend to all parts of the state, and injunctions, writs of prohibition and habeas corpus, may be issued and served on legal holidays and nonjudicial days. Jurisdiction to review administrative action shall be provided by law. They shall have power of naturalization, and to issue papers therefor, in all cases where they are authorized to do so by the laws of the United States.

Comment: This is a substitute for present section 11 and has been completely rewritten to carry out the intention of this proposal to place all trial jurisdiction in the hands of the district courts and abolish inferior courts and their jurisdiction. The enumeration of many specific matters has been compressed into the grant of jurisdiction over all justiciable matters, both civil and criminal. The enumeration of specific writs these courts are empowered to issue has again been brought together in the general power "to issue original and remedial writs." It is the intention of these provisions to place complete and plenary power in the district courts over all matters with which district courts deal now or may deal in the future. While no specific broadening of jurisdiction, beyond the assumption of that of the inferior courts, is contemplated, it is hoped that this provision is sufficiently complete to leave no gaps in the jurisdiction of these courts. The reference to naturalization has been carried forward from present section 11 because such specific reference appears necessary to exercise this essentially federal power.

Section 9. The judge or judges of each district may, with the approval of the chief justice of the Supreme Court, provide for divisions and assign judges to particular types of cases and create one or more magistrates' offices. Magistrates shall be appointed by the district judge or judges of each district and assigned to such matters and such cases as shall be prescribed by the judge or judges of each district, except criminal cases amounting to felonies in which magistrates may act only as committing and examining courts. Magistrates shall exercise the jurisdiction of district courts in all matters and cases assigned to them and shall serve at the pleasure of the appointing judge or judges. Compensation of magistrates shall be fixed by the appointing judge or judges.

Comment: This is a new section and is a basic change in setting up an efficient judicial system, flexible and responsive to the needs of the state.

The power to provide for divisions permits specialization on particular types of cases, as, for instance, juvenile delinquency proceedings and small claims litigation.

Difficulties resultant from the absorption of lower court jurisdiction into the district courts are met by the provisions for magistrates. These provisions are intended to permit the appointment of an officer who will exercise a limited portion of the district courts' jurisdiction as an integral part of the district courts, in a position somewhat similar to a master or referee under our present civil rules. It sets up a system by which part-time or full-time officers may be provided to handle part of the case load in the district courts. Magistrates may be appointed under this section to exercise jurisdiction in individual cases, in particular types or classes of cases, or to have complete jurisdiction over all types of cases permitted by this section in a particular territory. It may be that some of these appointments would be of a permanent nature and substantially conform to the duties now exercised in particular places by justices of the peace or police court judges.

This section requires the approval of the chief justice of the Supreme Court for the creation of magistrates' offices, thus building in a control over any possible tendency to establish unnecessary magistrates' offices and assuring careful consideration of the class of case and territorial boundaries within which magistrates shall act.

District judges are given power to fix the compensation of magistrates, because it would be very difficult, if not impossible, to enact legislation prescribing a scale of compensation in the diverse and possibly isolated cases in which magistrates may act. District judges now prescribe compensation for court appointed counsel and for lawyer-judges appointed by agreement of parties.

To make the system effective, special provisions respecting the qualifications and professional and public activities of magistrates are contained in sections 12, 15 and 16.

Section 10. The state shall be divided into judicial districts as provided by law, in each of which there shall be the number of judges provided by law. The Supreme Court may increase or decrease the number of judges in any judicial district, and may divide the state or any part thereof, into new districts, provided that each be formed of compact territory and be bounded by county lines. Changes by the Supreme Court in districts or the number of judges therein shall be effective

unless rejected by the legislature at the legislative session following the change. No change in the number or boundaries of districts or diminution of the number of judges, shall have the effect of removing a judge from office. Such change in districts or the number of judges therein shall not take place more frequently than every four years.

Comment: This section is new and is a substitute for present sections 13 and 14. It continues the present standards for the creation of judicial districts and guards against the elimination of any judicial positions through a change in district boundaries. The principal change is in the provision that the Supreme Court, rather than the legislature, shall have the power to change district boundaries and increase or decrease the number of judges per district. This permits continuous study of workloads and needs, and adjustments as needed for the efficient administration of justice. The legislative power to reject changes by the Supreme Court guards against any possibility of improper changes.

Section 11. There shall be a clerk of the district court in each county. He shall be appointed by the judge or judges of the district in which the county is situated and shall hold his office at the pleasure of that court. Deputy clerks may be appointed by the judge or judges of each district, and shall hold office at the pleasure of the appointing judge or judges. The number of deputy clerks to be appointed shall be subject to the approval of the chief justice of the Supreme Court. The duties of clerks and deputy clerks shall be prescribed by the appointing judge or judges.

Comment: This is a modification of present section 18, and follows the pattern of appointment provided in section 7 for the clerk of the Supreme Court. The provision for the appointment of deputy clerks would permit performance by them of some of the ministerial functions presently performed by justices of the peace, such as the collection of fines and the forfeiture of bonds.

QUALIFICATIONS, SELECTION AND REMOVAL OF
JUSTICES, JUDGES AND MAGISTRATES;
JUDICIAL COUNCIL

Section 12. No person shall be eligible to the office of justice of the Supreme Court, judge of a district court, or district court magistrate, unless he shall have been admitted to practice law in the Supreme Court of Montana, and be a citizen of the United States, except that a district court magistrate need not have been admitted to the practice of law if a judge of the district for which the appointment shall have been made shall certify that no person who has been admitted to the practice of law in the Supreme Court of Montana is available and shall file such certification with and secure the approval of the Supreme Court of Montana. No person shall be eligible to the office of justice of the Supreme Court unless he shall be at least thirty years of age and shall have resided in the state at least two years next preceding his appointment. No person shall be eligible to the office of district judge or district court magistrate unless he shall be at least twenty-five years of age and have resided within the state at least one year next preceding his appointment. District judges and magistrates need not be residents of the district for which they are chosen at the time of their appointment, but after his appointment a district court judge shall reside in the district for which he was chosen during his term of office.

Comment: This is a new section substituted for the present sections 10, 16, and 33 which provide qualifications and residence requirements for district court judges and Supreme Court justices. There is no good reason why these matters are separate in the present constitution and this is an attempt to achieve consolidation. The exception in the case of magistrates to the requirement of admission to the practice permits the operation of the magistrate system in sparsely populated areas of the state where in a given situation a duly admitted attorney is not available. But it is contemplated that a magistrate shall be admitted to the practice of law if possible, and to accomplish this a lawyer resident in one district may be designated to act in another district.

Section 13. There shall be a nonpartisan Judicial Council, composed of members divided equally between the judiciary, the bar and the public. The Legislature shall provide the numbers, qualifications and method of selection. The chief justice of the Supreme Court shall be a member and chairman of the Council. The Council shall appoint the following committees and establish their procedural regulations:

(1) A Nominating Committee. A majority of the Committee shall be members of the public and the remainder shall be members of the bar and none of the Committee shall be members of the legislative, executive or judicial branches of government.

All vacancies for chief justice and associate justices of the Supreme Court and district court judges shall be filled by appointment by the governor from a list submitted to him by the Nominating Committee of not less than two nor more than four qualified nominees for each vacancy. Justices and judges appointed by the governor shall serve such terms as shall be fixed by law. Each justice or judge who desires to remain in office upon the expiration of his term shall be subject to approval or rejection in an uncontested general election on a nonpartisan ballot, as the legislature shall provide.

(2) A Research and Qualifications Committee. A majority of the Committee shall be members of the judiciary and bar and the remainder shall be members of the public. Members of this Committee may also be members of the Nominating Committee.

The Committee shall have the power to investigate, upon complaint by any citizen or on its own motion, charges which would be the basis for retirement, censure, or removal of any justice, judge or magistrate. For this purpose, it shall be authorized to conduct hearings and subpoena witnesses and documents. Such proceedings shall be confidential. Upon finding charges to be well founded, the Committee shall file a formal complaint before the Supreme Court. The Supreme Court shall hear such complaint, and if it be substantiated may retire, censure, or remove from office any justice, judge, or magistrate. If the complaint be against a justice, the court shall call in a district judge as provided in Section 6 of this article.

The Research and Qualifications Committee also shall conduct continuing studies of the administration of justice in Montana and shall report to the legislature and to the Supreme Court as provided by law. Its studies shall include, but not be limited to, rules of procedure, practice, pleading, and evidence, the division of the state into judicial districts and the number of judges to be assigned to each district, and methods for the improvement of the administration of justice.

Comment: The provisions of subdivision (1) are substitutes for present section 6 and 12, which provide for the election of justices and judges. This provides for appointment of justices and judges from a qualified list submitted by a committee weighted in favor of laymen, and that to remain in office after expiration of their terms they shall run against their records rather than against other candidates. The purpose is to provide for a merit system of selection and retention, and to relieve justices and judges from political pressures.

Subdivision (2) complements subdivision (1) and is designed to protect against continuance in office of any incompetent or unethical justice, judge or magistrate. Since the Research and Qualifications Committee will deal with Professional problems, its membership is weighted in favor of the judiciary and bar.

The last paragraph of the Section affords a procedure for continuing study and development of information upon which the Supreme Court and the Legislature may act, as provided elsewhere in this Judicial Article.

MISCELLANEOUS PROVISIONS

Section 14. The justices of the Supreme Court and the judges of the district courts shall be paid by the state a salary which shall not be diminished during the term of office. Other costs of the judicial system shall be borne by the state, or by the state, counties, cities and towns in such proportions and in such manner as the legislature shall provide; and revenues from fines and fees charged by the courts of Montana shall be distributed as the legislature shall provide.

Comment: This is a new section, substituted for present section 29. It does away with the quarterly payment of judicial salaries, and permits the burden and revenues from judicial operations which are local in nature to be allocated between the state and its political subdivisions.

Section 15. No justice of the Supreme Court nor judge or magistrate shall accept or receive any compensation, fee, allowance, perquisite or emolument for or on account of his office, in any form whatever, except mileage, per diem and salary provided by law.

Comment: This is the same as present section 30, except that the prohibition upon the payment of mileage to judges has been eliminated and the payment of mileage and per diem has been expressly authorized. It was felt that this change would be desirable in view of the much more flexible methods of assigning judges, which could lead to financial hardship for a judge assigned to a position requiring considerable travel as contrasted with one whose assignment never requires any travel.

Section 16. No justice or clerk of the Supreme Court, nor judge or clerk of any district court shall act or practice as any attorney or counsellor at law in any court of this state or hold any public office during his continuance in office. This prohibition shall not apply to magistrates or deputy clerks of district courts.

Comment: This is present sections 31 and 35, except for the last sentence which is designed to permit operation of the flexible methods of appointments of magistrates and deputy clerks envisaged by sections 9 and 11.

Section 17. Each municipal court judge, police judge, and justice of the peace, in office at the effective date of this article shall continue to hold office and perform his present judicial functions until the expiration of his term. Each Supreme Court justice and district court judge in office on the effective date of this article shall continue to hold office and perform his judicial functions until rejected, removed, or retired as provided in section 13.

Section 18. On the effective date of this article:

(1) Each court into which jurisdiction of other courts is transferred shall succeed to and assume jurisdiction of all causes, matters and proceedings then pending, with full power to carry into execution or otherwise give effect to all orders, judgments and decrees entered by the predecessor courts.

(2) The files, books, papers, records, documents, moneys, securities, and other property in the possession, custody or under the control of courts hereby abolished, or any officer thereof, are transferred to the district court; and thereafter all proceedings in all courts shall be matters of record.

Comment (for sections 17 and 18): These are new sections designed to achieve a smooth transition from the present constitution and the system functioning thereunder to the new system set up in this proposed article.

* * *

Article III must also be revised to carry out the purpose of the Proposed Judicial Article. The following is a proposed revision.

ARTICLE III

Section 8. Criminal cases not amounting to felony shall be prosecuted by complaint. Felony cases shall be prosecuted by information, after examination and commitment as provided by law, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court. A grand jury shall only be drawn and summoned when a district judge shall, in his discretion, consider it necessary, and shall so order.

Comment: Provision for prosecution by complaint is made applicable to criminal cases not amounting to felony, instead of cases of which justice courts and municipal and other

courts inferior to the district court have jurisdiction, since such inferior courts would be abolished under the Proposed Judicial Article.

Section 23. The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. In civil cases where the sum claimed or the value of that which is claimed by the plaintiff, not including interest and costs, does not exceed ten thousand dollars, and in criminal cases not amounting to felony, a jury shall consist of not more six persons. In all civil cases and in all criminal cases not amounting to felony, two-thirds in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein.

Comment: The second sentence is changed to delete reference to justice courts to conform to the provisions of the Proposed Judicial Article. Under present section 23 the provision for a jury of six applies to cases wherein the claim does not exceed \$300. The amount has been raised to \$10,000.

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In addition to the above, to avoid surplusage, if present Article V, section 26, containing prohibitions upon special legislation, is carried over in a new Constitution, it should be amended by deleting the clause referring to the jurisdiction and duties of justices of the peace, police magistrates and constables.



